In the

Supreme Court of the United States

October Term, 1977

No. 77-950

COLLECTION CONSULTANTS, INC. AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
Court of Criminal Appeals of Texas

JURISDICTIONAL STATEMENT

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No.

COLLECTION CONSULTANTS, INC.
AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
Court of Criminal Appeals of Texas

JURISDICTIONAL STATEMENT

The Appellants, Collection Consultants, Inc. and Stella Thornton, respectfully pray that an order issue noting probable jurisdiction to review the Judgment and Opinion of the Court of Criminal Appeals of Texas entered on October 5, 1977.

Opinion Below

The Court of Criminal Appeals of Texas is the court of last resort for criminal appeals in Texas. The Opinion of that court in this case appears in the Appendix at page 3. The opinion is reported at 556 S.W. 2d 787 (Tex. Crim. App. 1977).

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1257(2), this being an appeal which draws into question the validity of Tex. Penal Code Ann., § 42.07(a) (2) (1974), on the ground it is repugnant to the Constitution of the United States.

The Appellants were convicted of telephone harassment in the County Criminal Court at Law No. 6 of Harris County, Texas. On appeal, their convictions and sentences were reversed on May 3, 1977. On the State's Motion for Rehearing the convictions and sentences were affirmed on October 5, 1977. On November 7, 1977, the Appellants' Motion for Rehearing was denied without written order. Timely notice of appeal to this Court was filed in the Court of Criminal Appeals of Texas on December 28, 1977. As the Court of Criminal Appeals of Texas explicitly rejected the Appellants' challenge to Tex. Penal Code Ann., § 42.07(a) (2) (1974), this matter is appropriately brought to this Court by appeal. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

In the event the Court does not consider appeal the proper method of review, the Appellants request the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103. Appellants would show that the state court below has decided the substantial federal question raised here in a way not in accord with applicable decisions of this Court, including *Coates v. City of Cincinnati, supra.*

Constitutional and Statutory Provisions Involved

This case involves the First and Fourteenth Amendments to the Constitution of the United States. This case also

involves Tex. Penal Code Ann. § 42.07(a) (2) (1974), which states:

> §42.07 Harassment.
>
> (a) a person commits an offense if he intentionally:
>
> (2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to alarm or annoy the recipient; (4 V.T.C.A. Penal Code, pp. 167-168.)

Question Presented

Whether Tex. Penal Code Ann. § 42.07(a) (2) (1974) which prohibits speech that allegedly annoys or alarms another person violates the First and Fourteenth Amendments to the Constitution of the United States?

Statement

Appellant Collection Consultants, Inc. (hereinafter "Collection") is engaged in the business of debt collection. Appellant Stella Thornton (hereinafter "Thornton") was an employee of Collection. The Appellants were charged by separate informations filed on October 15, 1974, with committing the offense of telephone harassment in violation of Tex. Penal Code Ann. § 42.07(a) (2) (1974). The informations charged that in attempting to collect an alleged debt owed by Ervin O. Grice, the Appellants threatened by telephone to take unlawful action against Mr. Grice. By this action, it was alleged that the Appellants intentionally and knowingly annoyed or alarmed the recipient of the calls or attempted to annoy or alarm the recipient.

The unlawful action allegedly threatened was to continue to call Mr. Grice until the debt was paid. Although

it did not appear on the face of the informations, it was the State's contention at trial that such conduct would violate Tex. Rev. Civ. Stat. Ann. art. 5069-11.03 (Supp. 1974), which states:

> Art. 5069-11.03. Harassment; Abuse.
>
> In connection with the collection of or attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, harass, or abuse any person by methods which employ the following practices:
>
> ... (d) causing a telephone to ring repeatedly or continuously or making repeated and continuous telephone calls with the willful intent to harass any person at the called number.

The case was tried before a jury from Feoruary 19, 1975 to February 21, 1975. The jury returned a verdict of guilty. Formal sentencing was rendered on March 13, 1975. The court fined Collection $1,000.00 and Thornton $150.00, and sentenced Thornton to 30 days confinement in the county jail, probated for 180 days.

On appeal, the Court of Criminal Appeals of Texas affirmed the convictions. The court summarily held that Tex. Penal Code Ann. § 42.07(a)(2) (1974) does not violate the First and Fourteenth Amendments to the Constitution of the United States.

How the Federal Question Was Raised and Decided Below

Prior to trial, the Appellants moved for dismissal of the informations on the ground that Tex. Penal Code Ann. § 42.07 (a)(2) (1974) is unconstitutional because it is vague and overbroad. The trial court overruled these motions without written order. On appeal to the Court of Criminal

Appeals of Texas, the Appellants' First Point of Error was that the trial court erred in not dismissing the informations because Tex. Penal Code Ann. § 42.07 (a)(2) (1974) is unconstitutional for it violates the First and Fourteenth Amendments to the Constitution of the United States. The convictions were affirmed with the court summarily rejecting the Appellants' constitutional challenge to the statute in question. See Appendix, pp. 9-10.

The Federal Question is Substantial

Telephonic communication is a means of speech and expression protected by the First and Fourteenth Amendments. *Walker v. Dillard*, 523 F. 2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975); *Huntley v. Public Utilities Commission*, 442 P. 2d 685 (Cal. 1968); *Anniskette v. State*, 489 P. 2d 1012 (Alaska 1971). As construed by the highest criminal court of the State of Texas, Tex. Penal Code Ann. § 42.07(a)(2) (1974) permits the restriction of this type of speech in a vague, overbroad, and standardless manner. Such a restriction contravenes the First and Fourteenth Amendments to the Constitution of the United States.

In holding that the statute in question is not unconstitutional, the Court of Criminal Appeals of Texas ignored this Court's holding in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). The *Coates* decision held that a city ordinance prohibiting conduct "annoying" to persons was vague and overbroad, and therefore, contravened the constitutional right of freedom of speech.

Precision in the definition of a criminal offense is a right of citizens guaranteed by the Fourteenth Amendment. A statute which either forbids or requires the doing of an act in language so vague that men of common understanding and

intelligence must guess at its meaning and differ on its application violates an essential element of due process of law. *Connally v. General Const. Co.*, 269 U.S. 385 (1926); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the intended dangers of arbitrary and discriminatory application . . . 408 U.S. at 108.

Since the words "annoy" and "alarm" are not defined in the Penal Code of Texas, the statute in question leaves the public uncertain about the conduct that is prohibited. It leaves judges and juries to subjectively decide, without a legally fixed standard, what is prohibited in each case.

The constitutional difficulty with the word "annoying" is that it means different things to different people. Quoting *Connally v. General Const. Co.*, 269 U.S. 385 (1926), this Court said in *Coates, supra*, that:

> [c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but

> rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning'. 402 U.S. at 614.

The problem identified in *Coates* is exemplified by the situation of the Appellants. Assertive language may be necessary for the successful collection of debts which are long past due. The Appellants could not possibly have known when their conduct became "annoying" or "alarming" and therefore violated the Texas statute. The statute clothes the listener with the sole power of determining if Appellants' speech was beyond the protection of the First Amendment. A similar statute was held unconstitutional by the Supreme Court of Alaska in *Anniskette v. State, supra*, wherein the Court stated:

> That the officer was personally offended by the telephone calls does not render the defendant's conduct a crime. That would be to make the terms of the statute in the content of the First Amendment shift from the mentation and emotional status of the recipient to the verbal communication. Under an objective standard, it is not permissible to make criminality hinge upon the ideological vicissitudes of the listener. A great deal more is required to place speech outside the pale of the First Amendment protection. 489 P. 2d at 1015.

The unconstitutionality of the statute is magnified since it authorizes the listener to determine if the caller commits a crime.

Not only is Tex. Penal Code Ann. §42.07(a)(2) (1974) void for vagueness, but also it violates the related constitutional principle of overbreadth. In *NAACP v. Alabama*, 377 U.S. 288 (1964), this Court stated:

> A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be

> achieved by means which would sweep unnecessarily broadly and thereby invade the area of protected freedoms. 377 U.S. at 307.

Since the statute in question does not provide a readily ascertainable standard of guilt and leaves to conjecture what conduct may subject an actor to criminal prosecution, it is a direct infringement on the constitutional right of freedom of expression. State legislatures may not allow such an infringement by abdicating their responsibility for setting standards of criminal laws. *Smith v. Gougen*, 415 U.S. 566 (1974).

The Court of Criminal Appeals of Texas has not interpreted the statute to limit its workings to constitutionally permitted regulation of speech. This has resulted in a denial of due process to the Appellants. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

This constitutional challenge to the validity of a statute of the State of Texas is a substantial federal question. Classically, review has been denied where the constitutional claim was a mere reference to a constitutional provision, *Sugarman v. United States*, 249 U.S. 182 (1919); where the contention was obviously without merit or frivolous, *Moyer v. Peabody*, 212 U.S. 78 (1909); or where the Supreme Court has already ruled adversely. *California Water Service Company v. City of Redding*, 304 U.S. 252 (1938). This case presents a real controversy over constitutional rights which depends upon the construction given the statute by this Court. The question, therefore, must be considered a substantial one justifying review by this Court. *Norton v. Whiteside*, 239 U.S. 144 (1915). Where the fundamental rights of free speech and liberty are so clearly involved, as here, the question presented is so substantial as to require consideration of the entire record, with briefs on the merits and oral argument, for its resolution.

Conclusion

Wherefore, for the foregoing reasons, these Appellants pray for an order of this Court noting probable jurisdiction to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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Proof of Service

I, Robert B. Cousins, IV, attorney for COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1977, I served three (3) copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on all parties in this proceeding required to be served by depositing the same in a United States mailbox, with first class postage pre-paid, at their post office addresses as follows:

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In the

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October Term, 1977

No. 77-950

COLLECTION CONSULTANTS, INC. AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

APPENDIX

To The Jurisdictional Statement

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In the

Court of Criminal Appeals of Texas

NO. 53,162

COLLECTION CONSULTANTS, INC.,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

NO. 53,163

STELLA THORNTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Court of Criminal Appeals affirming the judgments of convictions, entered herein on October 5, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(a).

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Proof of Service

I, Robert B. Cousins, IV, attorney for COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of December, 1977, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, by depositing the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses as follows:

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/s/ ROBERT B. COUSINS, IV

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Attorney for Appellants.

Dated this the 27th day of December, 1977.

COLLECTION CONSULTANTS, INC.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

STELLA THORNTON, alias Sadie Vance,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Nos. 53162, 53163.

Court of Criminal Appeals of Texas.
May 3, 1977.

State's Motion for Rehearing
Granted Oct. 5, 1977.

Appellants' Motions for Rehearing
Denied Nov. 2, 1977.

OPINION

DALLY, Commissioner.

These are appeals from convictions for the offense of harassment by the use of a telephone. V.T.C.A. Penal Code, Section 42.07(a)(2). The appellants were prosecuted in a joint trial. The appellant Thornton was alleged to be an agent of the appellant corporation, acting in behalf of the corporation and within the scope of her employment. See V.T.C.A. Penal Code, Section 7.22. The appellant corporation was assessed a fine of $1,000. The appellant Thornton's

punishment is confinement in the county jail for 30 days and a fine of $150; Thornton was granted misdemeanor probation for a period of 180 days.

The appellants have urged four grounds of error, but they have not contended that it was error to prosecute them under a general penal statute when a specific statute was applicable. As unassigned error under Article 40.09, Sec. 13, V.A.C.C.P., we must reverse the convictions because a specific statute prohibits the conduct which the State attempted to allege as an offense and the punishment assessed is greater than that provided by the special statute.

Only a short recitation of the testimony of the complaining witness is necessary. Ervin O. Grice testified that he received several telephone calls from a Sadie Vance representing Collection Consultants concerning a debt Grice allegedly owed Shamrock Oil Company. Grice received the first telephone call at work at 4:00 p.m. on July 15, 1974; he informed Sadie Vance that according to his records he did not owe Shamrock the amount of money they demanded and that he would prove it in court. On July 19, 1974, Grice received six telephone calls from Sadie Vance and two calls from a Gene Thomas of Collection Consultants. On July 22nd Grice received a series of four calls from Sadie Vance. On July 23rd Grice received calls from Sadie Vance at 1:41 p.m., 1:45 p.m., and 1:46 p.m.; at 1:59 p.m. he received a call from a Gene Thomas. Grice recognized the voice of Gene Thomas as the same person who had previously called him as Bob Grant of Collection Consultants. Later in the afternoon on July 23rd Grice received a call from Sadie Vance at 4:00 p.m., a call from Gene Thomas at 4:13 p.m., and two more calls from Sadie at 4:21 and 4:22 p.m. Grice made a tape recording of all the calls he received on July 23rd. Grice testi-

fied that he had heard appellant Stella Thornton speak and that her voice was the same voice he had heard on the telephone as Sadie Vance.

The State alleged and the proof shows that the telephone calls were "in connection with the collection of and attempt to collect a debt alleged to be owed by a consumer, namely Ervin O. Grice." Grice testified that he had purchased gasoline at a Sigmor service station and presented his Texaco credit card. The debt Grice allegedly owed Shamrock Oil Company arose from these purchases.

V.T.C.A. Penal Code, Section 42.07(a)(2), provides:

> "(a) A person commits an offense if he intentionally:
>
> > "(2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient;"

An offense under this section is a Class B misdemeanor, with a possible punishment of a fine not to exceed $1,000 or confinement in jail for a term not to exceed 180 days, or both a fine and imprisonment.

Article 5069-11.03, V.A.C.S., which was enacted at the same term of the Legislature as V.T.C.A. Penal Code, Section 42.07(a)(2), provides in part:

> "In connection with the collection of or attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, or abuse any person by methods which employ the following practices:
>
> > "(d) causing a telephone to ring repeatedly or continuously or making repeated and continuous

telephone calls, with the willful intent to harass any person at the called number."

An offense under this section is a misdemeanor punishable by a fine of not less than $100 nor more than $500. Article 5069-11.09, V.A.C.S.

It is a well settled rule of statutory construction that when two statutes cover the same subject matter, one general and the other special, the special statute will control. *Sheffield v. State*, 165 Tex.Cr.R., 354, 307 S.W. 2d 100 (1957); *Hines v. State*, 515 S.W. 2d 670 (Tex.Cr.App.1974); *Cuellar v. State*, 521 S.W. 2d 277 (Tex.Cr.App.1975).

Recently this Court held that the State could not successfully prosecute a defendant under a general penal statute when a specific statute was applicable. *Alejos v. State*, Tex. Cr. App., 555 S.W. 2d 444 (1977). In *Alejos* the defendant was convicted under the general statute for Evading Arrest, defined in V.T.C.A. Penal Code, Section 38.04. The facts showed that Alejos failed to stop his motor vehicle after a police officer in a marked police car signaled for him to stop by using emergency lights and siren. Alejos contended that he should have been charged under Article 6701d, Section 186, V.A.C.S., which makes it unlawful for a driver of a motor vehicle to flee or attempt to elude a pursuing police vehicle. It was said that Article 6701d, Section 186, V.A.C.S. and V.T.C.A. Penal Code, Section 38.04, may be construed together, and they can be harmonized by giving effect to the special statute when it is applicable to the facts.

In *Edwards v. State*, 166 Tex.Cr.R. 301, 313 S.W.2d 618 (1958), the defendant was convicted of driving while intoxicated and the jury assessed punishment under the general enhancement statute, Article 62, V.A.P.C. (1925). However, Article 802b, V.A.P.C. (1925), provided the punishment for

each and every subsequent conviction for the offense of driving while intoxicated. The Court held that the Legislature had provided by special statute the punishment for subsequent offenses of driving while intoxicated and that the special statute must control over the general enhancement of punishment statute.

V.T.C.A. Penal Code, Section 42.07(a)(2), is a general statute which provides a penalty for threatening to take unlawful action against any person by telephone. Article 5069-11.03, V.A.C.S., provides a different penalty for a debt collector to harass any person by causing a telephone to ring repeatedly or continuously *in connection with the collection of or attempt to collect a debt alleged to be owed by a consumer*. Under the facts presented here, the appellants can only be charged under Article 5069-11.03, V.A.C.S. Article 5069-11.03, supra, and V.T.C.A. Penal Code, Section 42.07-(a)(2) when construed together can be harmonized with the specific controlling over the general statute. The punishment assessed is more than that provided by the special statute.

In the event of further prosecution the State should replead the offense under the specific provisions of Article 5069-11.03, V.A.C.S.

The judgments are reversed and the causes remanded.

Opinion approved by the Court.

OPINION ON STATE'S MOTION FOR REHEARING

GREEN, Commissioner.

These appeals are from convictions, in a joint trial, for the offense of harassment by the use of a telephone. V.T.C.A.

Penal Code, Sec. 42.07(a)(2). Appellant Thornton was alleged to be an agent of appellant Collection Consultants, Inc., acting in behalf of the corporation and within the scope of her employment. See V.T.C.A. Penal Code, Sec. 7.22. Appellant corporation was assessed a fine of $1,000. Thornton's punishment was confinement in the county jail for 30 days and a fine of $150, the confinement being probated for a period of 180 days.

On original submission, in reversing the judgments we held as follows:

> "V.T.C.A. Penal Code, Section 42.07(a)(2) is a general statute which provides a penalty for threatening to take unlawful action against any person by telephone. Article 5069-11.02, V.A.C.S., provides a different penalty for a debt collector to harass any person by causing a telephone to ring repeatedly or continuously *in connection with the collection of or attempt to collect a debt alleged to be owed by a consumer.* Under the facts presented here, the appellants can only be charged under Article 5069-11.03, V.A.C.S. Article 5069-11.03, supra, and V.T.C.A. Penal Code, Section 42.07(a)(2) when construed together can be harmonized with the specific controlling over the general statute. The punishment assessed is more than that provided by the special statute."

By its motion for rehearing, the State requests that we reconsider the statutes as applied to "the facts presented here."

The opinion on original submission gives a short recitation of applicable testimony of the complaining witness Grice. We adopt that recitation, and add thereto the following:

Grice testified that each time the individual appellant called him she gave her name as Sadie Vance. On each occasion

he told her he had paid the debt in question and stated, "I would gladly prove my point in Small Claims or Civil Court." After testifying of her telephone calls of July 15, July 19, July 22, and July 23 as stated in the original opinion, Grice testified further:

"Q Mr. Grice, once again calling your attention to the calls that were made to you by the person you knew as Sadie Vance, did that person ever admit that she knew that what she was doing was violating the law by continuing to call you?

"A Yes.

"Q What were — How did that come about? In what words?

"A Well, when she'd call me I'd answer the phone and after I found out who it was, I'd tell Sadie that she was not permitting me to do my work and this constitutes harassment of the telephone; and she said, 'Yeah. I'm going to continue to call you, Mr. Grice, until you send me that check.'

"Q Did she ever tell you or was there ever any conversation between the two of you concerning whether or not she would continue calling you? Whether it was against the law?

"A Would you —

"Q Let me rephrase that. There's too many whether or not's.

"A Yeah.

"Q Was there ever a conversation between the two of you concerning her continuing to call you whether or not it was against the law?

"A Yes.

"Q Would you describe that to us, please, sir?

"A Well — uh — I would, like I say, tell Sadie that — uh — uh — I couldn't get any work done. That — uh — uh — this constitutes telephone harassment.

"She says, 'Uh-huh. I know this. I'm going to continue to call you until you send me that check, Mr. Grice.'

"Q Did she ever tell you to stop acting like a kid?

"A Yes, she did.

"Q When was this?

"A That was on one of those calls on July 23, 1974.

"Q How did these calls affect you, Mr. Grice, if they did?

"A Well, it was — I was — it was pretty embarrassing with the office mates sitting there and you hang up the phone, and you have a lady calling you and you can't really say that much with the exception of — uh — uh — you're harassing me. I don't really want to talk to you. And, I wasn't really able to get my work done.

"I couldn't work efficiently with the telephone ringing constantly."

The information in the case against the individual appellant alleged that on or about July 23, 1974, in Harris County, Stella Thornton alias Sadie Vance

> "did then and there unlawfully intentionally threaten by telephone to take unlawful action against Ervin O. Grice, in that the said Defendant, in connection with the collection of and attempt to collect a debt alleged to be owed by a consumer, namely Ervin O. Grice, did intentionally and knowingly threaten to cause a telephone to ring repeatedly and continuously and did

> make repeated telephone calls, and said unlawful action was done with the intent to harass Ervin O. Grice, at the called number and by this action did intentionally and knowingly annoy and alarm and intend to alarm the recipient, Ervin O. Grice * * *"

The information against the corporate appellant alleged the commission of the offense by the corporation by "Stella Thornton alias Sadie Vance, an agent of the said Defendant, acting in behalf of the said Defendant and within the scope of her employment." See V.T.C.A. Penal Code, Sec. 7.22. The evidence establishes that the individual appellant was acting within the scope of her employment as an agent of the corporate appellant.

V.T.C.A. Penal Code, Sec. 42.07, Harassment, in its pertinent parts provides:

> "(a) A person commits an offense if he intentionally:
>
> * * * * *
>
> "(2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient;
>
> * * * * *
>
> "(b) An offense under this section is a Class B Misdemeanor."

Punishment for a Class B misdemeanor is a fine not to exceed $1,000, or confinement in jail for a term not to exceed 180 days, or both such fine and imprisonment. V.T.C.A. Penal Code, Sec. 12.22.

The elements of Sec. 42.07(a)(2) are

"(1) a person

"(2) intentionally threatens

"(3) by telephone or in writing

"(4) to take unlawful action against any person

"(5) thereby intentionally, knowingly or recklessly annoys or alarms the recipient.

"(6) or intends to annoy or alarm the recipient."

Art. 5069-11.03, V.A.C.S., enacted at the same term of the Legislature as Sec. 42.07, supra, provides in its pertinent part:

"In connection with the collection of or attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, harass, or abuse any person by methods which employ the following practices:

"d. Causing a telephone to ring repeatedly or continuously or making repeated and continuous telephone calls with the intent to harass any person at the called number."

An offense under this article is a misdemeanor punishable by a fine of not less than $100 nor more than $500. Art. 5069-11.09, V.A.C.S.

The elements of the above offense are:

"(1) in connection with the collection or attempt to collect an alleged debt due and owing

"(2) a debt collector

"(3) may not oppress, harass or abuse any person

"(4) by causing a telephone to ring repeatedly or continuously

"(5) or by making repeated and continuous telephone calls

"(6) with the intent to harass the person called . . ."

Section 42.07(a)(2) of the Penal Code, supra, is general in nature, in that it applies to all *threats* by telephone or in writing to take unlawful action against any person, thereby intentionally, knowingly, or recklessly annoying or alarming or intending to annoy or alarm the recipient. The offense consists primarily of the *threats* to take unlawful action. Art. 5069-11.03, V.A.C.S., on the other hand, does not concern threats; it specifically makes it unlawful for a debt collector to harass any person by causing a telephone to ring repeatedly or continuously in connection with the collection of or attempt to collect a debt alleged to be owed by a consumer. The unlawful action which appellant Thornton threatened to take was to harass Grice by making repeated and continuous telephone calls until he paid the debt he told her he did not owe.

For a thorough explanation of statutes being either in or not in pari materia, see this Court's opinion on *rehearing* in *Alejos v. State*,[1] Tex.Cr.App., 555 S.W.2d 444 (1977). See also *Jones v. State*, Tex.Cr. App., 552 S.W.2d 836; *Cuellar v. State*, Tex.Cr.App., 521 S.W.2d 277; *Hines v. State*, Tex.Cr.App., 515 S.W.2d 670; 53 Tex. Jur.2d Statutes, Sec. 186, p. 280; Art. 5429b-2, Sec. 3:06, V.A.Civ.St. (Code Construction Act); V.T.C.A. Penal Code, Sec. 1.05(b). After holding the two statutes there involved not to be in pari materia, the opinion on rehearing in *Alejos* continues:

"Arguably under the facts of the instant case, the State could have prosecuted and successfully proved the elements of either § 186 of Article 6701[illegible], supra, or § 38.04 of the Penal Code. Appellant in a motor vehicle refused to obey the signal of a uniformed police officer in a

[1] The opinion in the instant case on original submission cited as authority for its decision this Court's original opinion in *Alejos* delivered prior to the granting of the State's motion for rehearing and affirmance of the judgment in that case.

marked police vehicle to stop his car. That was a violation of said §186 without regard to whether the officer was attempting to make an arrest. However, in doing so, appellant also fled from an officer who had probable cause to arrest. This was a violation of said §38.04 without regard to whether appellant was driving a vehicle when doing so or whether the officer was in uniform, etc. A similar situation could arise where the State prosecutes for burglary and the defendant urges that the prosecution should be for criminal trespass."

[1.2] The prosecution of the instant case was for threats made by appellants which were proscribed by V.T.C.A. Penal Code, Sec. 42.07, supra. The primary function of Art. 5069-11:03 V.A.C.S., as applied to the facts of the instant case, is that it made unlawful the action which appellants threatened to take against complainant. The State was authorized to carve as large an offense from the transaction as it could, provided it cut only once. *Alejos v. State*, supra (on rehearing); *Ex parte Jewel*, Tex. Cr.App., 535 S.W.2d 362. We conclude that the State properly exercised its option as to which offense it sought to prosecute.

We now consider appellants' four grounds of error.

[3, 4] In their first ground, appellants contend V.T.C.A. Penal Code, Sec. 42-07(a) (2) is unconstitutional in that it violates the First Amendment of the United States Constitution and also that it fails to meet the requirements of the Due Process Clause of the Fourteenth Amendment because the use of the terms "annoy" and "alarm" is vague and standardless.

Article 476, V.A.P.C., repealed by the Legislature in 1973, was the predecessor to V.T.C.A. Penal Code, Sec. 42.07. That Article in its pertinent part provided:

> "Whoever . . . uses any telephone in any manner with intent to harass, annoy, torment, abuse, threaten or

> intimidate another, except if such call be for a lawful business purpose, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for not less than one (1) month nor more than twelve (12) months, or by both such fine and imprisonment."

In *Schuster v. State*, 450 S.W.2d 616, the Court, speaking through Judge Onion, stated:

> "The conviction is for violation of Article 476, Vernon's Ann.P.C., with punishment assessed at a fine of $200.00.
>
> "In her sole ground of error appellant challenges the constitutionality of Article 476, supra. In *Alobaida v. State*, Tex.Cr. App. 433 S.W.2d 440, this Court in an opinion by Presiding Judge Woodley upheld the constitutionality of said statute. We adhere to that decision. See also *LeBlanc v. State*, Tex.Cr.App., 441 S.W.2d 847. As we view it, such statute is not violative of the First Amendment, United States Constitution or Article 1, Sec. 8, Texas Constitution, Vernon's Ann. St."

In *LeBlanc v. State*, supra, the contention that Art. 476, V.A.P.C., was void as being too vague and indefinite was overruled, and the constitutionality of the statute in that respect was upheld.

We fail to find any meaningful distinction between the language in Art. 476, V.A.P.C., supra, and the language in Sec. 42.07(a) (2) here complained of which could affect the validity of Sec. 42.07(a) (2) under the right of Free Speech Amendment or cause the statute to fail to give to a person of ordinary intelligence fair notice that his contemplated

conduct is forbidden. See *Papachristou v. Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L.Ed.2d 110 (1972). The first ground of error is overruled.

[5] In their second ground, appellants contend the court erred in requiring appellant. Thornton to give "testimonial evidence" in violation of her rights under the Fifth Amendment to the United States Constitution and Art. 1, Sec. 10, of the Texas Constitution.

Grice, the complaining witness, testified he would recognize the voice of the person who continuously harassed him over the telephone. In the absence of the jury, the court required Thornton, over appellants' objection, to repeat in Grice's presence the following:

> "I know I'm breaking the law, and I will continue to call you on your job. I'm going to keep calling you until this bill is paid."

In the jury's presence, Grice identified appellant Thornton's voice as being the voice of the person who had made the telephone calls.

In *McInturf v. State*, Tex.Cr.App., 544 S.W.2d 417, this Court held that no constitutional error was committed when the trial court required the defendant to speak in the presence of prosecutrix, and in absence of the jury, for identification purposes. We quoted with approval from *Moulton v. State*, 486 S.W.2d 334, 337, as follows:

> "A handwriting exemplar in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside the protection of the Fifth Amendment to the Constitution of the United States, *Gilbert v. California*, 388 U.S. 263 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966) and is outside the protection of Article 1, Section 10 of the Constitution of this state, Vernon's Ann. St., *Olson v. State*, 484 S.W.2d 756 (Tex.Cr.App. 1972)."

See also *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149.

Appellants' second ground of error is overruled.

In ground three appellants complain the following remarks concerning appellant's payment by commission for collecting overdue debts constituted improper jury argument.

> "What's her motivation? Money. These people are bounty hunters."

[6, 7] Appellants' objection to the remarks was sustained, and the court instructed the jury to disregard the comments. Appellants made a request for a mistrial. A conference between the attorney and the court ensued, and, following the conference, appellants failed to secure a ruling on his motion for mistrial. Appellants' failure to secure an adverse ruling on his motion for mistrial preserves nothing for review. *Bailey v. State*, Tex.Cr.App., 532 S.W.2d 316; *Cain v. State*, Tex.Cr.App., 549 S.W.2d 707. Further, the trial court's instruction to disregard the complained of remarks removed the harmful effects thereof, if any, *Spaulding v. State*, Tex.Cr.App., 505 S.W.2d 919; *Ramos v. State*, Tex. Cr.App., 419 S.W.2d 359.

Ground of error three is overruled.

[8] Appellants in their fourth ground complain of the court's limitation of the time in which to obtain an expert to examine a recording tape read in evidence.

In a pre-trial session appellants' motion for discovery was presented and ruled upon.[2] On the day of the trial the State filed a trial brief supporting the admission of taped recorded evidence. The following day the tapes were offered and played to appellants and their counsel in the absence of the jury.

Thereupon, the following proceedings occurred:

"MR. COUSINS (Appellant's Attorney):
Your Honor, at this time we renew our Motion for Discovery.

"We request the Court, as part of our Motion for Discovery on January 10th, to the effect of it to allow this tape to be examined by an expert of our own choosing, in accordance with the law, within the presence of those members of the District Attorney's staff and the State so directed also.

"THE COURT: All right, gentlemen. You have one hour. I assume you have him ready?

"MR. COUSINS: I'm making my Motion for Discovery. Your Honor. I do not have him ready.

"THE COURT: How long do you think it will take, Counsel?

"MR. COUSINS: It will take longer than an hour and a half.

"THE COURT: You were aware of the possibility of this evidence being considered yesterday. You will be given until 1:30, between this time and that; and the Record can show it is now 12:15 — 12:14.

"The State will make Exhibit 11 available to the Defense for examination by an expert of their choosing.

"MR. ARNOLD (State): Your Honor, for the Record, may we have a designated place?

[2] Appellants do not complain of any ruling made at this pre-trial hearing. Their complaint is to the court's refusal to grant their motion for continuance and discovery made during the trial, as stated infra.

"THE COURT: In these Chambers."

After the expiration of the time allowed by the court the appellants again moved for "a continuance and for discovery to allow for the process testing of the tape stating that such testing would take longer than one and one-half hours. Their motion was denied, and appellants excepted to the ruling of the court.

The record reflects that the State's trial brief filed the first day of the trial alerted appellants of the existence of the tape recording and the State's intention to offer it in evidence. Appellants' request on the following day for more time and further discovery under Art. 39.14. V.A.C.C.P., was not diligently made, and under the circumstances shown, the court did not abuse its discretion in denying appliants' motion, based only upon equitable grounds, and refusing to delay the trial and give appellants additional time to test the tapes. *Freeman v. State*, Tex.Cr.App., 556 S.W.2d 287 (1977); *Chance v. State*, Tex.Cr.App., 528 S.W.2d 605; *Ward v. State*, 520 S.W.2d 395.

Further, appellant cross-examined the witness Grice, who testified concerning the tape recording, at great length about the tapes and his identification of Thornton's voice, and no prejudice to appellants is reflected by the record or shown or attempted to be shown in their brief. No testimony was offered and no contention was made at the hearing on appellant's motion for new trial to indicate harm resulting from the failure to grant appellants request for further time to review the tapes.

Reversible error is not presented, and the fourth ground of error is overruled.

The State's motion for rehearing is granted.

The judgments are affirmed.

Opinion approved by the Court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-950

* * *

COLLECTION CONSULTANTS, INC. AND STELLA THORNTON,

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

On Appeal From The Court of Criminal Appeals of Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-950

* * *

COLLECTION CONSULTANTS, INC.
AND STELLA THORNTON

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

ON APPEAL FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS

* * *

MOTION TO DISMISS OR AFFIRM

* * *

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Criminal Appeals of Texas on the grounds that is manifest that the questions on which the decision of the court depends are so unsubstantial as to require no further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Texas Penal Code, i.e., 1974 V.T.C.A., Penal Code, Section 42.07 (a)(2), which provides:

> (a) A person commits an offense if he intentionally:...
>
> (2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient;...
>
> (c) An offense under this section is a Class B misdemeanor.

The requisite culpable mental states are defined in 1974 V.T.C.A., Penal Code, Section 6.03:

> (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exists. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

> (c) A person acts recklessly, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

B. The Proceedings Below

The Appellant Stella Thornton, an agent of Appellant Collection Consultants, made several telephone calls to Ervin O. Grice concerning a debt that Grice allegedly owed Shamrock Oil Company. The first phone call was received from Mr. Grice at work at 4:00 p.m. on July 15, 1974, at which time Grice informed Appellant Thornton that according to his records he did not owe Shamrock Oil Company the amount of money demanded and that he could prove his claim in court. Four days later, Grice received six telephone calls from Appellant Thornton and two calls from another employee of Collection Consultants. Then a mere two days later Grice received a series of four phone calls from Appellant Thornton. The next day, Grice received three phone calls from Appellant Thornton within a ten minute period and another phone call from a second employee of Appellant Collection Consultants. Later, that same day, Grice received three additional calls from Appellant Thornton within a half hour period and a second call from another employee of Collection Consultants. Although Appellant Thornton used different names in talking to Mr. Grice, Mr. Grice testified that the voices were one and the same. Additionally, Mr. Grice tape recorded all eight calls which he received on the last day. On each occasion, Grice informed Appellant

Thornton that he had paid the debt in question and finally called Appellant Thornton's attention to the fact that he believed her to be violating the law by continuing to call him, to which she replied, "Yeah, I'm going to continue to call you, Mr. Grice, until you send me that check." The Appellants were prosecuted in a joint trial and each was convicted of the offense of harassment by the use of a telephone.

Contending, among other grounds, that Section 42.07(a)(2) was unconstitutional as violative of the First Amendment, the Appellants pursued a direct appeal to the Texas Court of Criminal Appeals. Their convictions were originally reversed on the basis of an unassigned error; however, on the State's Motion for Rehearing, the convictions were affirmed. *The State of Texas v. Collection Consultants, Inc. and Stella Thornton*, 556 S.W.2d 787.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The precursor of Section 42.07(a)(2) was Article 476 of the former Penal Code.[1] The constitutional validity of that statute was first upheld by the Texas courts in *Alobaida v. State*, 433 S.W.2d 440 (Tex.Crim.App. 1968), *cert. denied* 393 U.S. 943 and was subsequently affirmed until the enactment of the present Penal Code.[2]

---

[1]Article 476 of the former Penal Code provides in pertinent part:

> "Whoever ... uses any telephone in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another, except if such call be for a lawful business purpose, shall be guilty of a misdemeanor..."

[2]*LeBlanc v. State*, 441 S.W.2d 847 (Tex.Crim.App. 1969); *Schuster v. State*, 450 S.W.2d 616 (Tex.Crim.App. 1970).

In upholding the instant conviction, the Texas high court correctly evaluated Appellants' claim both in light of those cases upholding the validity of the former law and in light of recent decisions of this Court addressing attempts to curtail protected First Amendment freedoms.

Appellants contend that the decision of the Texas Court of Criminal Appeals ignores this Court's decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Appellants argue *Coates* holds that a city ordinance prohibiting conduct "annoying" to persons is vague and overbroad and that it therefore contravenes the constitutional right of freedom of speech. The statute involved in *Coates* provided in pertinent part: "It shall be unlawful for three or more persons to assemble except at a public meeting of citizens, on any of the sidewalks, corners, vacant lots, or alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." In striking down the ordinance as unconstitutional on its face, this Court found it to be unconstitutionally vague because it subjects the exercise of the right to assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

In discussing the term "annoying" as it appears in the ordinance, this Court noted:

> "Conduct that annoys some people does not annoy the others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at it meaning."

Coates, supra, 402 U.S. at 614.

Appellants argue that since the words "annoy" and "alarm" are not defined in the Texas Penal Code, then the statute in question leaves the public uncertain about the conduct that is prohibited. It is Appellants' position that "assertive language may be necessary for the collèction of debts which are long past due" (Appellants' Jurisdictional Statement at 7) and that such language may be "alarming" to some recipients.

However, contrary to Appellant's assertions, Section 42.07(a)(2) does not suffer from lack of notice to potential offenders. The statute is plainly directed not to *any* First Amendment telephone conversation which the listener finds annoying or alarming, but to those communications which *threaten* to take *unlawful action* against the recipient, thereby annoying or alarming the listener. Clearly the statute is specific enough to give a person of ordinary intelligence fair notice that his contemplated conduct of threatening another with unlawful action by telephone is forbidden as harassment by statute. As noted in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), citing *Lanzetta v. New Jersey*, 306 U.S. 451, greater leeway is allowed in the field of regulatory statutes concerning business activities where the acts limited are in a more narrow category. The statute in question does not plainly forbid annoying telephone conversations, only those telephone conversations conveying a threat to take unlawful action which alarm the recipient. In an age of increasing use of telephonic communications as a debt collecting device, the State certainly has an interest in restricting wanton harassment even though it involves First Amendment constitutionally protected conduct.

Appellants also urge that the unconstitutionality of the statute is magnified in that it enables the listener

himself to determine if the caller commits a crime. Apparently Appellants are analogizing the provision of this harasment statute with the unfettered discretion placed in the hands of the Jacksonville Police by the vagrancy statute in *Papachristou*, supra. Appellants argue that Section 42.07(a)(2) does not provide a readily ascertainable standard of guilt and thereby leads to conjecture of what conduct may subject an actor to criminal prosecution. By taking that position, Appellants ignore those statutes which for example define the aggravating element of the underlying felony in terms of the victim's preception of the danger he is in. Similarily, statutes attempting to define such elusive offenses as obscenity, public lewdness, and indecency are often drafted with the emphasis placed on the viewer's *preception* of and reaction to the act rather than on the act standing in isolation. Moreover, the requisite culpable mental state so fully defined in 1974 V.T.C.A., Penal Code, Section 6.03 is an essential element of every harassment offense and focuses upon the mental state and intent of the actor, not the reaction of the recipient. The statute under review is a constitutionally permitted regulation of that speech which conveys a threat of unlawful action and causes alarm.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as require no further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in these causes by the Court of Criminal Appeals of Texas.

Respectfully submitted,

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PROOF OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas and a member of the Bar of this Court, hereby certify that a copy of Appellee's Motion to Dismiss or Affirm has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, this ___ day of April, 1978, addressed to attorney for Appellant, Robert B. Cousins, 3100 First National Bank Building, Dallas, Texas 75202.

JOE B. DIBRELL, JR.
Assistant Attorney General

In the

Supreme Court of the United States

October Term, 1977

No. 77-950

COLLECTION CONSULTANTS, INC.
AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
Court of Criminal Appeals of Texas

REPLY TO MOTION TO DISMISS OR AFFIRM

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REPLY TO MOTION TO DISMISS OR AFFIRM

The Appellants, COLLECTION CONSULTANTS, INC., and STELLA THORNTON, respectfully submit the following as their Reply to the Motion to Dismiss or Affirm filed by the State of Texas.

INTRODUCTION

The sole issue presented by this appeal is whether Tex. Penal Code Ann. § 42.07(a)(2) (1974)[1], which prohibits speech that allegedly annoys or alarms another person,

[1] This Provision states:

§ 42.07 Harassment.

(a) a person commits an offense if he intentionally:

(2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to alarm or annoy the recipient; (4 V.T.C.A. Penal Code, pp. 167-168.)

violates the First and Fourteenth Amendments to the Constitution of the United States. In the Jurisdictional Statement, the Appellants demonstrated that since fundamental rights of free speech are infringed upon by Tex. Penal Code Ann. § 42.07(a)(2) (1974), this issue is a substantial federal question which should be the subject of review by this Court.

The defense of Tex. Penal Code Ann. § 42.07(a)(2) (1974) by the State of Texas is based upon the judicial construction within Texas of a similar statute which was a part of the former Texas Penal Code, and upon the State's interpretations of this Court's First Amendment decisions. In this reply, the Appellants demonstrate that the contentions articulated in the Motion to Dismiss or Affirm are misconstructions of the determinative constitutional principles involved in this appeal.

ARGUMENT

The precursor statute, Article 476, provided criminal sanctions for using a telephone "in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another." Unlike Tex. Penal Code Ann. § 42.07(a)(2) (1974), the former statute also contained an exception for telephone calls placed for a lawful business purpose. In *Alobaida v. State*, 433 S.W. 2d 440 (Tex. Crim. App.) *cert. denied*, 393 U.S. 943 (1968), this former statute was challenged on the grounds that the exception violated the Equal Protection Clause of the Fourteenth Amendment. The Court of Criminal Appeals of Texas rejected this argument ruling that the exception was reasonable since it was not designed to apply to any particular class of persons. The challenge which the Appellants have lodged against Tex. Penal Code Ann. § 42.07(a)(2) (1974) — the vagueness and overbreadth of the statute — was not considered in *Alobaida, supra*, and the decision is of no value to this Court. Even less authority is provided by the other Texas cases cited by the State. *LeBlanc v. State*, 441 S.W. 2d 847 (Tex. Crim. App. 1969) and *Schuster v. State*, 450 S.W. 2d 616 (Tex. Crim. App. 1970). The Court summarily affirmed *Alobaida, supra*, in each of these decisions and the opinions contain absolutely no discussion of the constitutional issues involved.

In its Motion to Dismiss or Affirm, the State of Texas misconstrues a leading First Amendment case, *Coates v. City of Cincinnati*, 402 U.S. 661 (1971). As discussed at length in the Jurisdictional Statement, *Coates* requires precision in the definition of a criminal offense. The State of Texas contends that Tex. Penal Code Ann. § 42.07(a)(2) (1974) provides an ascertainable standard of guilt because "the statute is plainly directed not to any First Amendment telephone conversation which the listener finds annoying or alarming, but to those communications which threaten to take unlawful action against the recipient thereby annoying or alarming the listener." (Motion to Dismiss or Affirm at p. 6). This statement is a gross oversimplification of the dilemma in which the Appellants were placed by Tex. Penal Code Ann. § 42.07(a)(2) (1974).

The unlawful act which the Appellants allegedly threatened to take, thereby violating Tex. Penal Code Ann. § 42.07(a)(2) (1974), was to commit the offense of harassment by telephone. This offense is defined by Tex. Rev. Civ. Stat. Ann. art. 5069-11.03 (Supp. 1974), which states:

> Art. 5069-11.03. Harassment; Abuse.
>
> In connection with the collection of or an attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, harass, or abuse

any person by methods which employ the following practices:

> . . . (d) causing a telephone to ring repeatedly or continuously or making repeated and continuous telephone calls with the willful intent to harass any person at the called number.

To determine whether their conduct was violative of Tex. Penal Code Ann. § 42.07(a)(2) (1974), the Appellants had to first ascertain whether their conduct amounted to harassment within the meaning of Article 5067, and then further ascertain whether such conduct annoyed or alarmed the recipient of the call. These judgments had to be made in a vacuum since Texas law does not define the words "harass", "annoy", or "alarm". It was just this type of dilemma which offended this Court in *Coates v. City of Cincinnati, supra.*

Finally, the Motion to Dismiss or Affirm concedes that Tex. Penal Code Ann. § 42.07(a)(2) (1974) delegates to the recipient of a telephone call the decision of when such a verbal communication is outside the protection of the First Amendment. The State argues that such a situation is no different than statutes which define obscenity with reference to the viewer's perceptions. This Court, however, has consistently held that such statutes are only constitutional when they meet certain objective standards. See *Miller v. California*, 413 U.S. 15 (1973). Tex. Penal Code Ann. § 42.07(a)(2) (1974) provides no objective standards and results in the regulation of speech by the subjective impressions of a prosecuting witness in a way that allows arbitrary and erratic enforcement. Such imprecise standards are not adequate to protect a citizen's fundamental right to freedom of speech. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

CONCLUSION

Wherefore, for the foregoing reasons and for the reasons set forth in the Jurisdictional Statement, the Appellants respectfully pray for an order of this Court noting probable jurisdiction to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

/s/ ROBERT B. COUSINS, IV

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PROOF OF SERVICE

I, Robert B. Cousins, IV, attorney for COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1978, I served three (3) copies of the foregoing Reply to Motion to Dismiss or Affirm on the party to this proceeding required to be served by depositing the same in a United States mailbox, with first class postage pre-paid, at the following post office address:

Ms. Catherine E. Greene
Assistant Attorney General
P. O. Box 12548,
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